SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. .....

W. K. ARCHER AND ERCELL G. WESTFALL, CO-PARTNERS DOING BUSINESS AS W. K. ARCHER AND COMPANY, PETITIONERS AND APPELLANTS,

VS.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT AND APPELLEE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, filed February 15th, 1943, is a final judgment, and is published in 133 F. 2d 795 (Record 243).

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These grounds appear as a part of the foregoing Petition for Writ of Certiorari, and are hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

This statement also appears as a part of the foregoing Petition for Writ of Certiorari, and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in sustaining the ruling of the Securities and Exchange Commission that a misrepresentation of fact, made by the buyer in connection with a settlement of damages for the breach of contract by the seller of securities, is within federal cognizance, and is within the purview of Section 15 (c) (1) of the Securities Act of 1934.

(2) The Circuit Court of Appeals erred in ruling that it cannot modify a final judgment of the Securities and Exchange Commission that cancels the registration of a broker and expels him from stock exchanges.

E.

SUMMARY OF THE ARGUMENT.

Point I.

A misrepresentation of fact is not one made to effect a transaction in, or to induce the purchase or sale of, a

security, where it is made in an effort by the buyer to secure from the seller of securities damages for the latter's breach of contract to deliver. Such a misrepresentation is not of "federal" concern, but is purely a matter of local concern and law, and for local action.

Point II.

A misrepresentation of fact is not a fraudulent one where its only purpose and effect is to induce a person to pay his debts.

Point III.

A final and mandatory judgment by the Securities and Exchange Commission, revoking a broker's license, is such an "order" of the Commission as is reviewable and subject to modification, by the reviewing court, under Section 25 of the Securities Act of 1934.

ARGUMENT.

POINT I.

(a)

The conceded facts in the Dewey Portland Cement case are set out on page 224 of the Record. Here is shown a sale of stock that through the default of the seller, another broker, was never consummated. There remained to be recovered from the seller, by suit or settlement, the damages caused by the seller's default. The Statute (Section 15 (c) (1) of the Securities and Exchange Act) is directed against fraud that aims "to effect any transaction in or to induce the purchase or sale of any security." No fraud was here committed with the view of effecting or inducing any transaction in securities or sale or purchase of securities. The misrepresentation charged neither induced the contract nor its breach. It was made in connection with a settlement out of Court of a claim for damages for the breach. The Act does not purport to concern itself with such collateral matters, matters of purely local concern, of State law and State action.

If the Act covers a misrepresentation made in connection with a *peaceful* settlement of a claim as here, then also would it obviously cover a fraud committed in a state court in an action brought to *enforce* the claim. Surely, neither the Commerce clause nor the Acts passed under it contemplated federal action going into such labyrinths. "Commerce" simply is not involved here, and if the Act could be considered as covering the facts here, a grave question of its constitutionality would arise.

In *National Labor Relations Board* v. *Jones and Laughlin Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, this Court (l. c. 30) said:

> "That distinction between what is national and what is local in the activities of Commerce is vital to the maintenance of our federal system."

and again (l. c. 32):

> "Whether or not particular action does affect Commerce in such a close and intimate fashion as to be subject to federal control * * * is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed."

In *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126, this Court (59 S. Ct., l. c. 214) said:

> "The question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority * * *. The justification for the exercise of federal power should clearly appear. But the question in such a case would relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts."

In a case arising under this Securities and Exchange Act, a District Court in the State of New York (*Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 315) said:

> "To be sure, there is a limit to the control of both the mails and interstate commerce. Congress may not use either of these powers in an arbitrary manner, as to take away a right guaranteed to citizens by other provisions of the Constitution or to seize control of a matter purely local. *Adair* v. *U. S.,* 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436; *Hammer* v. *Dagenhart,* 247 U. S. 251, 38 S. C. 529, 62 L. Ed. 1101; *Railway Retirement Board* v. *Albany Ry.,* 295 U. S. 330, 55 S. Ct. 758, 79 L. Ed. 1468."

The glaring fact here is that no "sale" or "purchase" or "transaction" in stock was "induced" or "effected," no one sold, no one purchased. There was merely an untainted contract for the purchase and sale of stock, a contract that the seller breached. No action not clearly within the scope of Section 15 (c) (1) of the Act in question can be considered as a violation of it. As said in *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 892:

> "The Statute must be strictly construed since a violation of it may be punished as a crime."

POINT II.

Section 15 (c) (1) of the Securities Exchange Act deals with "manipulative, deceptive or other fraudulent device or contrivance." This means "fraud." A misrepresentation is not legally a fraudulent one where its only purpose and effect is to induce the performance of an existing obligation. The eastern broker, the Sheeline Company, had sold stock to Petitioners. Sheeline Company had sold "short." It could not deliver although Petitioners voluntarily gave it a month to "cover" the sale. No Dewey stock could be found wherewith to fill the contract. The Sheeline Company broke its contract and owed damages because of such breach. It owed such damages to *someone*. Whether it owed it to Petitioners or to someone else would be of no consequence; the validity, merit, value and extent of the claim would be the same whether owed to Petitioners or to a customer of Petitioners, real or fictitious. And the fact that the demand for $300 was made by a supposed customer of Petitioners rather than by the Petitioners could, of course, in no way have influenced Sheeline action on the claim, or swell the amount it would pay in settlement. That Company knew what it was willing to pay to avoid court action. It *was* willing to pay the $300. It was merely induced to do what it was under legal obligation to do.

"Fraud without damage or injury is not remediable."
26 C. J. 1167.

"Plaintiff may recover when he shows that he has sustained some pecuniary damage or injury by reason of having been put in a position worse than he would have occupied if there had been no fraud."
26 C. J. 1169.

"One suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do, such as pay a just debt."
23 Am. Jur., p. 996.

In the leading case, *Fulton* v. *Head,* 34 Pa. 365, 75 Am. St. Rep. 670, the Court said:

"A party who seeks release from the obligation of his bond, on the ground of actual fraud or misrepresentation, must establish that there was a false representation of a matter of *substance, important* to *his interests,* and actually misleading him to his hurt" (Italics ours).

In *Deobald* v. *Opperman,* 111 N. Y. 531, 19 N. E. 94, the Court said:

"It is the very essence of an action of fraud or deceit that the same should be accompanied by damage, and neither *damnum absque injuria* nor *injuria absque damnum* by itself establishes a good cause of action. *Hutchins* v. *Hutchins,* 7 Hill 104. Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform. *Thomson* v. *Menck,* 41 N. Y. 82."

In *Musconetcong Iron Works* v. *Delaware, L. & W. Ry. Co.,* 78 N. J. L. 717, 76 Atl. 971, the Court said:

"* * * A person induced by false representations to do an act, which it was his duty to do, cannot be heard to say that he was prejudiced by such false representations."

In 26 C. J. 1168, the author says:

> "Falsehood which causes no injury may be a moral but cannot be a legal wrong."

That the above is true is nowhere more clearly and decisively asserted than in the case of *Stratton Independence, Limited,* v. *Dines,* 135 Fed. 449 (8th Cir.). There, the Court said:

> "Fraudulent representations and deceit, if not productive of injury or loss, are moral not legal wrongs. Fraud without damage, or damage without fraud, gives no cause of action."

This charge concerning the Sheeline settlement is only one of several charges against Petitioners that were sustained by the Commission and Court. If, however, error exists in sustaining this specific charge, then the error should be corrected, for this charge may have been the very charge that impelled the Commission to inflict the extreme penalty allowable by the Act.

POINT III.

The Court of Appeals refused to modify the severity of the penalty imposed by the Securities and Exchange Commission. This, on the stated ground that the penalty was within the power conferred upon the Commission. Such refusal is in line with the majority ruling in *Wright* v. *Securities and Exchange Commission,* 112 F. 2d 89 (2nd Cir.). We believe that in this case and likewise in the Wright case, sufficient consideration was not given to Section 25 (a) of the Securities Act of 1934 (15 U. S. C. A. 78Y). That section gives the Court of Appeals the exclusive power to review any "order" of the Commission at the request of any person aggrieved by such order. The reviewing Court is limited in passing upon the facts. If there be "substantial" evidence to support the Commission's findings of facts, then those findings may not be disturbed. As to "orders" of the Commission, however,

the Statute gives the reviewing Court full and exclusive power to affirm or modify or enforce or set aside, in whole or in part. In all the Acts creating administrative bodies, Congress has provided for judicial reviews of the proceedings of such bodies, either in a plenary action in equity as in the case of the Interstate Commerce Commission, or by direct and final review as in the case of the Act in question and in many others.

As said of this Act:

> "Congress has provided within this Act the exclusive remedy for persons aggrieved by the operations of the act."
>
> (*American Sumatra Tobacco Company* v. *Securities and Exchange Commission*, 93 F. 2d 236.)

This Section 25 of the Act empowers the Court of Appeals to modify *any* order by which the person affected by it considers himself aggrieved. Petitioners consider themselves aggrieved by an order that took from them not only their seats in the Stock Exchange and their broker's license, but even the right as dealers to deal in securities that they *own*. And they have asked the Court to exercise its discretionary power to modify this sentence, and temper the wind.

This expulsion and revocation of license was by an "order" of the Commission, and is subject to modification like any other order of the Commission. Section 25 of the Act covers all orders, regardless of their nature. It was a final order, a judgment.

> "It is part of an order, and the order is final, not tentative. It was entered as the result of a formal controversy, and it marked the disposition of the controversy, not a preliminary stage."
>
> (*Alton Ry. Co.* v. *United States et al.*, 287 U. S. 229, 53 S. Ct. 124, 77 L. Ed. 275.)

> "By an 'order' is meant some command of the Commission directing or restraining action or granting

> or denying some form of relief. An 'order' is a mandate, precept, a command or direction authoritatively given * * *. An order of the Commission is analogous to the judgment of a court, and it is well settled that findings constitute no part of a judgment even though incorporated in the same instrument with it. * * * The judgment itself does not reside in its recitals, but in the mandatory portion."
>
> (*Carolina Co.* v. *Federal Power Commission,* 97 F. 2d 435.)

In a case involving this Act, the Court modified an order of the Commission which would result in disclosures of petitioners' trade secrets. The Court ruled such order to be reviewable and set it aside, saying:

> "We are not concerned here with an administrative ruling—but with action which operates particularly rather than general—with a judgment entered on a state of facts and affecting only one person."
>
> (*American Sumatra Tobacco Co.* v. *Securities & Exchange Commission,* 93 F. 2d 236.)

The same Court later (*Aluminum Company* v. *Federal Power Commission,* 130 F. 2d 445) said of its opinion in the Tobacco case:

> "We held that order in that case reviewable. We based our decision upon the proposition that property rights may not be put in jeopardy or destroyed in any proceeding before an administrative board without notice, hearing *and* judicial review, and we found nothing either in the language of the Act or in its legislative history to justify the conclusion that review of type of order in question was not contemplated."

There is, also, nothing in the Act or its legislative history to justify the view that the reviewing Court is powerless to modify an order—a judgment, that wipes out a man's hard won business and standing in the business world.

The Act (Section 25) makes no distinction between orders. All final, affirmative orders are included.

This Court has never passed upon this important question of law. It should be settled by it.

CONCLUSION.

There are presented here questions of grave public importance, of deep concern to the multitude that deal, as broker or customer, in securities. It would be well that this Court speak with final authority upon the matters presented.

Respectfully submitted,

CARL V. RICE,
Counsel for Petitioners.